

PAY EQUITY FOR HONG KONG: A PRELIMINARY EXPLORATION

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*Anne Cheung**

Introduction

Equality has become an increasingly important issue in the latter part of the 20th century. Yet its precise meaning remains unclear. In the feminist debate, some argue that any difference in the capabilities of men and women are insignificant. Women have the ability to achieve what men can do, and should be allowed the opportunity to do so. On the other hand, others acknowledge that women are in many ways different from men (as in the obvious case of pregnancy), and that society therefore has a duty to accommodate women's needs and to assimilate them into society.

The limitations of this analysis are, however, clearly exposed in the employment context when attempts are made to tackle the wage differential between male and female workers. In the context of remuneration, it is easy enough to argue that women should be paid equally. When women are hedged into certain types of jobs in the market, it is hard to reject the proposition that they be provided with equal opportunities so as to assimilate them into society. But these arguments are caught in the 'sameness-difference' debate: the notion that women have to be what men are, or to do what men are doing, in order to be recognised as useful members of society is controversial.¹ If women want to stay in certain traditional female occupations and to argue that their worth has been under-valued, there will need to be a move towards the theory of pay equity — the concept of 'equal pay for work of equal value,' an advance from the idea of 'equal pay for equal work' which refers only to the idea that female workers should receive the same pay as male workers if both are employed by the same employer in precisely the same work and under conditions where the female workers are expected to do whatever the employer could expect of the male workers. In contrast, 'equal pay for work of equal value' applies where male workers and female workers are not employed in identical work, but employed in work of 'comparable worth' or of 'same value.' The intended consequence is

* Lecturer, Department of Law, University of Hong Kong. This paper began as a project for the International Human Rights Internship Program between the Faculties of Law, of the University of Toronto and the University of Hong Kong. I would like to thank Professor Kent Roach of the University of Toronto and Mr Andrew Byrnes of the University of Hong Kong for their kind supervision. I am also grateful to the anonymous referee for many helpful comments and suggestions, and to all those I interviewed for their valuable views and time.

¹ C Littleton, 'Toward A Redefinition of Sexual Equality' (1981) 95 Harv L Rev 487, 487-90.

that the wage for a job normally performed by a woman will then be assessed without regard to the gender of the workers.²

The purpose of this article is to illustrate the concept of pay equity by (1) documenting the existence of a wage gap in the Hong Kong labour market; (2) advancing the concept from 'equal pay for equal work' to 'equal pay for equal value of work,' so as to make more visible the inherent worth of work traditionally performed by women; and (3) exploring the feasibility of implementing pay equity in Hong Kong's free market economy.

The wage gap

Wage disparity is one quantifiable measure of sexual inequality. It is also one of the more blatant forms of sexual discrimination in Hong Kong. Very often, women earn less than men even for the same type of work.³ According to government statistics in March 1994, the nominal overall monthly salary is \$7,596 for women compared with \$9,172 for men, while the real wage is \$4,685 for women and \$6,810 for men. These results suggest a 17.2 per cent to 31 per cent⁴ differential in average wage earning. According to another report⁵ in March 1993, men are paid more than women in most occupations and in most industries. Out of the 22 different industries, in regard to craftsmen and operatives only female craftsmen earn higher daily wages than male craftsmen in the printing, and bleaching and dyeing industry⁶ (a ratio of one to ten). However, the situation improves slightly when salaries are calculated on a monthly basis⁷ where women earned higher than men in four out of 24 job categories⁸ (a ratio of one to six). This discrepancy may be explained by the fact that women are concentrated in semi-skilled or unskilled jobs. Therefore,

² E Todres, 'Women's Work in Ontario: Pay Equity and the Wage Gap' (1990) 22 Ottawa LR, 555, 560. The meaning of 'equal value' will be further discussed in the section 'From equal work to equal value of work' below.

³ Annex V of the *Hong Kong Green Paper on Equal Opportunities for Women and Men* (Hong Kong: Government Printer, 1993) showed the wage gap in various jobs across different industries.

⁴ The calculation method: [(men's wages minus women's wages) divided by men's wages] multiplied by one hundred.

⁵ Wages and Labour Costs Statistics Section, *Report on Half-Yearly Survey of Wages, Salaries and Employee Benefits* (Hong Kong: Government Printer, 1993), vol II.

⁶ Table 1, 'Average Daily Wages, Normal Hours of Work and Standard Working Days of Craftsman and Operatives analysed by Industry by Occupation By Sex': *ibid.*

⁷ See Table 4 on 'Average Monthly Salaries, Normal Hours of Work and Standard Working Days for Selected Common Occupations in the Supervisory, Technical, Clerical and Miscellaneous Non-Production Workers Analysed By Sex': *ibid.*

⁸ Table 4 of the government statistics showed four industries, including 24 job categories, while Table 1 was limited to craftsmen and operatives in different industries. The four job categories in which women workers earned higher than men workers were production supervisor and maitre d' under the group of 'supervisory and technical workers,' and documentation/shipping clerk and personnel clerk under the group of 'clerical and secretarial workers.' However, when fringe benefits were included, men workers earned more than women workers in all of the industries. Surprisingly the only exception was 'bus boy' in the 'service workers.'

when wages are calculated in daily rates or by piece rate, women may earn less as there is no strict job comparability.⁹

Besides the problem of unequal pay for equal jobs, Hong Kong women also need to confront the issue of 'unequal pay for equal value of work,' the absence of pay equity between jobs traditionally performed by men and jobs traditionally performed by women. This concept is particularly important to women workers because the market is highly segregated, rendering a strict comparison of salaries difficult, if not impossible. Women are barred from joining certain occupations, like cutters in the garment industry, because of traditional beliefs. The China Motor Bus Company employs only male bus drivers. The Kowloon Motor Bus Company hires women bus drivers but for single-deck buses only and this directly affects the income of women bus drivers.¹⁰

In the first quarter of 1994, there were 254,248 men and 201,605 women in the manufacturing industries, one male to 0.8 female. There were, however, a greater number of female labourers working in the community, social, and personal services sectors (one male to 1.2 female).¹¹ But for industries requiring high physical labour, such as construction, electricity, and gas, only a small number of female workers are employed. Furthermore, women are shown to be concentrated in support and service oriented occupations and under-represented in positions of executive, managerial, or skilled labour. As much as 28.8 per cent of the working women work as clerks while only 8 per cent of the working men are employed in clerical jobs. Women employed in craft or related work constitute only 4.4 per cent of the female working population while 20.9 per cent of the male workforce are employed in similar jobs.¹²

The crowding effect of women into certain 'types' of jobs is often termed as 'horizontal segregation' or 'occupational segregation.'¹³ This naturally results in job labelling as 'men's jobs' and 'women's jobs.' This kind of designation, in turn, leads to the under-valuation and under-payment of the work that women do as the structure of society makes it difficult to document women's perspective. When women act in supplementary and supportive roles, like nurses,

⁹ Y T Wong, 'An Investigation into The Employment of Women in Hong Kong' in F M Cheung, P K Choi, L M Choy, and P S Wan (eds), *Selected Papers of Conference on Gender Studies in Chinese Societies* (Hong Kong: Chinese University of Hong Kong, 1991), p 60.

¹⁰ Association for the Advancement of Feminism, 'Sex Discrimination At Work in Hong Kong' (September 1992) *Women's News Digest* 7. This policy is still maintained in 1995. The Kowloon Motor Bus Co only recruits women bus drivers for single-deck buses. The monthly salary of a single-deck bus driver will be approximately \$7,000 while double-deck bus drivers will earn about \$10,000.

¹¹ Table 2.3 on the 'Number of Establishments and Persons Engaged, Other Than Those in the Civil Service, Analysed by Major Industry Group, First Quarter of 1994' in *Hong Kong Monthly Digest of Statistics, October 1994* (Hong Kong: Government Printer, 1994).

¹² Table 3.7, 'Working Population by Occupation, Sex and Activity Status, the 1991 Population Census,' *Hong Kong Annual Digest of Statistics* (Hong Kong: Government Printer, 1993).

¹³ Horizontal segregation or occupational segregation refers to occupational fields which are dominated by one sex only. For further discussion of the definition and effect of occupational segregation, see P Weiler, 'The Wages of Sex: The Uses and Limits of Comparable Worth' (1986) 99 *Harv L Rev* 1728, 1741-3.

secretaries, or personal attendants, this kind of work is seen as being 'natural,' not 'meriting high compensation,' hence the job is under-valued. The tasks performed by women may not be seen as 'job-related' or may be viewed only as 'intrinsic' on the part of women.¹⁴

This kind of discriminatory practice can be traced back to its historic roots when women first entered the labour force.¹⁵ They were hired for the same kinds of tasks they performed at home; domestic chores, nursing the sick, and caring for the children. Since this labour was performed gratis by wives, mothers, and unmarried sisters, employers responded with low wages. The labour market can, in fact, be viewed as an extension of relations in the private home. The sexual division of labour duplicates itself from the micro family to the macro world. Women are constructive members in the family and in the economy, yet they are expected to be complementary and supplementary components rather than equal partners of men.

In addition, discriminatory practices are reinforced by the tacit understanding that the man is the family's principal breadwinner. A woman's status, no matter how significant, is negligible when compared with a man's status as the income provider. Women, therefore, have to bear the fate of being 'last hired, first fired.'

Pay equity hence invites us to explore the inherent values of women's jobs, to determine critically 'what' constitutes a job, and to know 'how' the job is evaluated. The acknowledgement and recognition of the connection between occupational segregation and devaluation of women's work is a constant motif in pay equity studies. The main task is to compare different work under the same value system. In other words, the value system of society has to be questioned and explored.

From equal work to equal value of work

The revaluation of women's worth

As early as 1951, the International Labour Organisation's Convention (No 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value had already implemented the spirit of pay equity by establishing the principle of equal pay for work of equal value.¹⁶ Later, in 1971 the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) restated the concept of equal value of work under Article 11(d).¹⁷

¹⁴ R Steinberg, *Comparable Worth and Wage Discrimination: Technical Possibilities and Political Realities* (Philadelphia: Temple University Press, 1984), p 23.

¹⁵ E Todres, 'Managing Pay Equity: A Bureaucrat's View of Bill 154' (3 September 1987); unpublished paper kindly supplied by the Ontario Pay Equity Commission. The paper was written by E Todres when she was the Assistant Deputy Minister of the Ontario Women's Directorate.

¹⁶ Articles 1 and 2 of the Convention.

¹⁷ CEDAW was signed by the United Kingdom in 1986 and by China in 1980.

Fundamentally, pay equity requires that wages should be paid on the basis of the value to an employer of the work performed, if the work involves substantially the same skill, effort, and responsibility, and is performed under similar conditions, regardless of the gender of the worker.¹⁸

Unlike direct discrimination, redress to achieve pay equity does not require the finding of fault. The focus is on the effect caused by occupational segregation in the market. From a different perspective, pay equity no longer questions the segregation of work, but questions how segregation affects pay. It is built on the positive recognition that women's work has merit and that women do not have to resemble men to be valued. It is a compensatory remedy instead of a remedy that deals with the nature of women's work. In re-valuing women's work, the whole societal value system has to be redefined.

The heart of the pay equity debate is often on what constitutes 'equal value' for work. The Ontario government's Green Paper on Pay Equity¹⁹ in 1985 stated specifically that 'equal value' does not mean 'identical value.' It is intended that a range of similarity will be allowed. Under the Ontario Pay Equity Act,²⁰ the gender-neutral factors that must be considered are (1) skill, (2) effort, (3) responsibility required in the performance of the work, and (4) conditions under which it is normally performed (s 5(1)). The criteria used in assessing each factor can be broken down as follows :

- (1) skill: reading, writing skill, innovation, planning skills, reasoning skills, and communication skill;
- (2) effort: physical and mental effort;
- (3) responsibilities: autonomy, complexity, judgement, job knowledge, experience;
- (4) working conditions: working environment.²¹

It can therefore be concluded that job value is a composite concept. If the composite score for a female-predominant job was equivalent to the composite score of a male-predominant job, then women were to be paid as much as men.

Feminists' main concern is the non-recognition or the invisibility of women's job skills. A contemporary form of bias against women is to overlook skills specific to female-predominant jobs when assigning weights in job-evaluation scales. A study by the Communication Workers of America found that job-evaluation plans in the United States public sector recognise lifting boxes and driving vans as special skills but not typing or shorthand.²² The

¹⁸ E Todres, 'Women's Work in Ontario: Pay Equity and the Wage Gap' (1990) 22 Ottawa LR 555, 560.
¹⁹ *Green Paper on Pay Equity* (Toronto: Minister Responsible for Women's Issues, 1985).

²⁰ Revised Statutes of Ontario 1990 cP7.

²¹ This is not an exhaustive list but a set of examples of job factors. For more details see C J Elliot and S D Saxe, *Pay Equity Handbook* (Toronto: Canada Law Book Inc, 1992), p 24, and Ontario Pay Equity Commission, *How To Do Pay Equity Comparisons* (Toronto, March 1989), pp 27-8.

²² US Congress, 'Options' (1985); East York Women Teachers' Association, 'Response to the Green Paper on Pay Equity' (1986).

Ontario Pay Equity Commission also pointed out that women's work descriptions are often broadly and vaguely grouped under the headings of 'clerk' or 'secretary' while men's work is individualised into defined categories of maintenance plumber, maintenance electrician, electrical maintenance mechanic, mechanic 1, and mechanic 2.²³

Besides facing the non-recognition of their work, women also have to face the devaluation of women's job skills and the tendency to assign less value to skills important in female-predominant jobs. Little value is attached to contacts with co-workers and the public, but high value is given to contacts with 'high ranking officials,' which are more important to males in the authority hierarchy. Within manual work, lifting may be given greater value than manual dexterity. The physical effort and danger involved in 'male' jobs rank higher than the working constraints of women's office jobs, such as lack of privacy, eye strain, monotony, noise, and stress. The end result is that female dominant jobs are given lower grade value.

What do we value?

Steinberg and Haignere explain that this pervasive phenomenon of salary inequities is caused by traditional job evaluation methodologies, by deeply entrenched cultural and social stereotyping of the work traditionally done by women and the value attached to it.²⁴ Women's work differs from men's work, both in the past and the present. Women work predominantly in clerical, retail, and service sectors; men continue to dominate in managerial, industrial, and financial sectors.²⁵ Our pay practice reflects long-standing historical, social, and economic relations in which men are the 'bread-winners,' and women the 'home-care givers.' The result is that women's work is often trivialised and considered less valuable. The economic compensatory system continues to reflect this unequal economic status.

The non-recognition of the skills, ability, and experience of women in these jobs leads to an inaccurate and inadequate appraisal of the value of their worth, and the resultant wages paid to them are lower than they ought to be. In deciding which job content factors are to be included in a job-comparison

²³ Ontario Pay Equity Commission, 'Gender-Neutral Job Comparison, Implementation Series No 9' (July 1988), material kindly supplied by the Ontario Pay Equity Commission on author's request.

²⁴ R Steinberg and L Haignere, 'Equitable Compensation: Methodological Criteria for Comparable Worth' in C Bose and G Spitze (eds), *Ingredients for Women's Employment Policy* (New York: State University of New York, 1987), p 163.

²⁵ According to Table 3.7 of the *Annual Digest of Statistics 1993* of Hong Kong, in 1991 only 4.9 per cent of the female labour force were employed in managerial and administrative jobs while 11.9 per cent of male labour were employed in these jobs. The ratio is 3.9 to one. Women in professional jobs constituted 3 per cent of the female workforce while 4.1 per cent of the male workforce were in professional jobs. The ratio of the number of men to women is 2.2 to one. On the contrary, women associate professionals constituted 11.3 per cent of the female labour force while men constituted only 9.7 per cent.

system and how to weigh each factor, the whole societal value system is being confronted.²⁶

Some feminists wish to add an additional dimension to what society counts as 'valuable' but has been taken for granted for a long time. They demand a right to be recognised. They question our current value system by asking certain fundamental questions: Are technical skills more valuable²⁷ or more complex than social skills? What is the relative importance of the ability to manage social interaction, to tolerate routine tasks, and to analyse problems? Is mental labour more prestigious than manual labour? Is scientific work more prestigious than caring for children? Is giving directions more prestigious than working out what they mean and following them closely? It is not clear that one is more difficult than the other. The valuing of abilities is an ongoing process, showing social bias in our society. It is never a neutral descriptive process.

The powerful message conveyed by pay equity is that society's value system needs to be revolutionised. The 'feminisation of the job content values' involves re-assessing women's knowledge and abilities that have been ignored. The term 'equal pay for work of equal value,' therefore, calls for a economic theory that takes care of both the male and female contributions, and that 'maximises consistency and minimises bias.'

The feasibility of closing the wage gap

It is an indisputable fact that a wage gap exists between men and women. Yet there is a general reluctance to implement pay equity measures due to the following reasons:

- (1) there may be explanations other than discrimination to account for the wage gap;
- (2) the proposed legislative instruments in Hong Kong are adequate to deal with the problem; and
- (3) closing the gap by means of legislation is regarded as interfering with Hong Kong's free market and too costly for the economy.

Alternative explanations for the wage gap

In the face of concrete evidence of pay differential in jobs, opponents of pay equity legislation may offer divergent explanations of the wage gap. The

²⁶ Women's skills have often been considered part of their femininity. Being polite, helpful, and attractive are considered personality, not skill. Lois Haignere lists four notable categories of female-dominated job contents (care-giving, exposure to communicable disease, food and laundry services, and information management) that have been traditionally ignored. See 'Pay Equity Implementation' in J Fudge (ed), *Just Wages* (Toronto: University of Toronto Press, 1991), p 160.

²⁷ R Steinberg, 'The Unsubtle Revolution: Women, the State, and Equal Employment' in J Jenson, E Hagen, and C Reddy (eds), *Feminism of the Labour Force: Paradoxes and Promises* (Cambridge: Polity Press, 1988).

existence of the wage gap is regarded as the result of a cumulative history of discrimination and bias that cannot be remedied by any legal means. It is also understood as the outcome of neutral market forces that reflect the differences in skills and education of women and men workers and their individual family and employment choices.²⁸ Another common excuse that is often cited is that women are poor proxies for strength. However, the general trend that women are earning less than men in most industries, even for supervisory, technical, clerical, and non-production work,²⁹ should be able to dispel the popular myth that men are paid better than women due to their physical strength. Moreover, if men are better paid because of their physical strength, other forms of labour and contribution are being denied. In fact, professional and managerial workers, rather than sweating labourers, rank among the highest earning group in society.

To counter the argument that 'neutral' market forces will result in pay practices that discriminate against women, examples from Canada and the United States should be looked to for guidance. In 1982 women workers in Ontario, Canada, on average earned 62 per cent of what men earned. The wage gap of 38 per cent was the result of a number of factors, including differences in hours worked, the degree of unionisation, the level of education, occupational segregation, and discrimination. When the former three factors were excluded, a wage gap in the order of 15–20 per cent still persists. The gap was due specifically to occupational segregation and the consequent undervaluation of women's work. An extent estimated at 5–10 per cent was attributable to overt gender discrimination.³⁰

In the United States, each year from 1975 through to 1981, the median income of females working full-time, throughout each year, was between 59 per cent and 60 per cent of the median earnings of their male counterparts. After considering the factors of hours of work on the job, the length of experience in the labour force, and the location, hazards, and other conditions of work, the level of the wage gap explained by sex discrimination is in the order of 10–15 per cent.³¹

Assuming that the Hong Kong labour market is also affected by the same kind of 'neutral job factors' as in the American and Ontario experience, the wage gap in Hong Kong due to discrimination may still amount to about 10 per cent. In 1991, there were around 1.8 million working women, earning a gross of around \$125 billion a year. If their work was under-valued by just 10 per cent, that means Hong Kong women are as a whole being short-changed in the

²⁸ Y N Tong, 'How to Prescribe Equal Pay for Equal Work' (April 1992) *Women's News Digest* 7–8.

²⁹ *Report on Half-Yearly Survey of Wages, Salaries and Employee Benefits* (Hong Kong: Government Printer, various) in different years confirms the trend that women are earning less than men in different industries.

³⁰ Note 19 above, p 74.

³¹ Weiler (note 13 above), p 1784.

economy by over \$12.5 billion a year. Regardless of whether this is caused by past or current sex discrimination, it is an injustice that should be undone.

The adequacy of proposed legislative instruments

If Hong Kong is to implement pay equity with any vigour, it needs a separate piece of legislation. The newly enacted Sex Discrimination Ordinance (SDO) does not provide adequate protection against wage discrimination.³² The ordinance prohibits only unequal pay for equal work. Section 5(1)(a) defines the scope of discrimination to include the less favourable treatment of an employee on the ground of her sex as this is a blatant form of direct discrimination. Section 11(1)(b) prohibits an employer from offering less favourable terms to an employee on the ground of her sex. However, the concept of unequal pay for similar or comparable work would likely fall outside the ambit of definitions of direct discrimination used in the ordinance. Pay equity is also not covered by the concept of indirect discrimination which focuses upon the disproportional effects of one sex caused by seemingly neutral conditions (covered by s 5(1)(b)). It can be more aptly described as a redress for systemic discrimination, an attempt to address the structural imbalance caused by social, economic, and historical reasons.

This inability of traditional anti-discrimination legislation to address pay equity is illustrated in the English case of *Enderby v Frenchay Health Authority*.³³ Dr Enderby, the plaintiff, claimed that she was engaged on work of equal value and that she was unlawfully discriminated against on the ground of sex under both national law and European Economic Community provisions.³⁴ She was in the profession of speech therapist, in which 97.9 per cent of employees were women. She alleged that members of her profession were paid significantly less than members of a comparable profession (principal clinical psychologist and Grade III principal pharmacist, only 29.23 per cent of whom were women). Her claim failed both in the Industrial Tribunal and the Employment Appeal Tribunal on the grounds that: (1) there was no direct (intentional) or indirect discrimination; (2) the pay differences could be specifically structured to each profession, namely, the different collective bargaining processes; and (3) the

³² At the time of writing (April 1995), the Sex Discrimination Bill and an Equal Opportunities Bill were pending in the Legislative Council. In the end, only the Sex Discrimination Bill was passed (on 21 July) as Ordinance No 67 of 1995. However, the SDO is not yet in force, as it 'shall come into operation on a day to be appointed by the Secretary for Home Affairs' (s 1(2)).

³³ The English Court of Appeal referred the case to the European Court of Justice (Case C-127/92 Court of Justice of the European Communities, cited in [1994] 1 All ER 495).

³⁴ The national legislation that *Enderby* relied on were the Sex Discrimination Act 1975, the Equal Pay Act 1970, and the Equal Pay (Amendment) Regulations 1983. The EEC provision that was relied on was Article 119 of the EEC Treaty (1972) which stated that 'each Member State shall ... ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.' Article 1 of Council Directive 75/117 of 10 February 1975 provides that the principle of equal pay enshrined in Article 119 means 'the same work or for work to which equal value is attributed.'

impact of market forces, especially the need to attract pharmacists into the National Health Services by offering them higher salaries, played a part in causing the pay difference.

Dr Enderby appealed against the decision and took the case to the Court of Appeal, which, considering that the outcome of the proceedings was dependent on the interpretation of Article 119 of the European Economic Treaty, referred the case to the European Court of Justice. Specifically, the Court of Appeal referred the following three questions to the European Court:

- (1) Did the principle of equal pay stated in Article 119 EEC require the employer to justify objectively the difference in pay between a male-dominated job and a female-dominated job?
- (2) If yes, could the employer justify the difference in pay by saying that it was a result of different bargaining processes which did not discriminate on grounds of sex and which did not operate to disadvantage women on the basis of their sex?
- (3) If the employer could prove that the pay difference was 'partially' attributable to market scarcity, whether this could objectively justify the entire difference in pay, or the market force argument justified only part of the pay difference, or it could not justify the difference at all?³⁵

The European Court ruled that (1) once wage disparity was proved to exist between the two jobs of equal value, a *prima facie* case of discrimination was established and, under Article 119, the employer had to show that the difference was based on objectively justified reasons; (2) the collective bargaining process was not a sufficiently objective justification for the difference in pay; and (3) market forces and the need to attract candidates in a particular field could be an objectively justified reason. It was for the national court to determine, if necessary by applying the principle of proportionality, whether and to what extent the shortage of candidates for a job and the need to attract them by higher pay constituted an objectively justified economic ground for the difference in pay between the jobs in question.³⁶ The European Court sent the case back to the English court and the final outcome of the case is not yet known.

The decision of the European Court can be said as a case making 'one step forward, two steps back.' It made a seemingly significant stride by ruling that wage disparity between two jobs of equal value (no additional factor required) will establish a *prima facie* case of indirect sex discrimination.³⁷ In contrast, the

³⁵ [1994] 1 All ER 495, 500.

³⁶ *Ibid.*, pp 521–3.

³⁷ *Ibid.*, pp 513 para 15e and 516 para 35c.

traditional approach to indirect discrimination requires the applicant to establish that there is a neutral 'requirement' or 'condition' (for example, the imposition of an age bar) which applies equally to men and women but the proportion of women who can comply with it is considerably smaller than men. The applicant must also show that she cannot comply with the requirement. Even so, the employer can still refute the claim of indirect discrimination if it can demonstrate that the requirement is necessary under the circumstances. The fixity of establishing such a 'requirement' or a 'hurdle' in the case of *Enderby* formed the major argument of the Employment Appeal Tribunal³⁸ in the first instance, when it ruled out a case of indirect discrimination. In other words, the court was ruling that, in the area of equal pay, the imposition of a 'requirement' is not a prerequisite to a successful claim of indirect discrimination. The emphasis should only be on the adverse impact on women.³⁹

However, this does not mark a victory for women workers. Although the effect is shown to be detrimental to women, it can be 'lawful' and justified by objective economic ground. As criticised by Kentridge, the 'objectively justified factors' do not change the fact that the practice has adverse consequences for women, and that the practice is objectively necessary to the business does not make it fair to women who are disadvantaged by it.⁴⁰

The European Court actually back-tracked on its own reasoning. At first, the court ruled out the need to establish a 'requirement' as it held that the focus should be on the adverse impact on women. However, at the final stage, the court ruled that pay difference might actually be justified by objective reason (in *Enderby*, the possible reason was market forces, or the need to attract candidates in a particular field by offering higher wages). We are brought back to the very first step. Ultimately the court was still looking for 'reasons,' and was still concerned with 'intention.' The test of 'justifiable reason' actually introduces the element of intent in direct discrimination⁴¹ through the back door. This 'means-end' test of establishing a rational connection of justifiable reason forces women to enter another level of scrutiny. Moreover, the test can be easily manipulated by an employer as long as he can provide a seemingly valid reason.

As Article 119 of the EEC Treaty already states the principle of pay equity, it is redundant for the European Court to find a way to label the practice of wage disparity between jobs of equal value as a form of indirect discrimination. In the end, we find that pay discrimination for jobs of equal value does not fit into the category of direct discrimination as we are not concerned with an expressed intention; nor does it fit into the category of indirect discrimination because

³⁸ [1991] ICR 382, 403h.

³⁹ [1994] 1 All ER 495, 516 para 35c.

⁴⁰ J Kentridge, 'Direct and Indirect Discrimination after *Enderby*' [1994] Public Law 198, 203.

⁴¹ Direct discrimination refers to intentions to treat individuals or groups disadvantageously because of a characteristic of the individual or group members. (See K O'Donovan and E Szyzszak, *Equality and Sex Discrimination Law* (Oxford: Basil Blackwell, 1988), p 72.)

this category involves the necessity of establishing a 'requirement' on the employer's part. Even if we can establish a case of wage disparity, discrimination can still be 'justified' by the employer with an 'objective factor.'

In order to redress the inadequacy and limitation within the concepts of direct and indirect discrimination, one needs to see the issue of wage disparity as 'systemic discrimination,' which describes discrimination in established social, economic, and historical patterns and structures. It looks at the result and a group's right.⁴² In other words, 'systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring, and promotion, none of which is necessarily designed to promote discrimination.'⁴³ This signifies an important ideological shift, as discrimination is not seen as an individual problem but as a symptom of broader social ills.

Realising that women often lack the skill, resources, or the knowledge to tackle the problem of wage difference, pay equity plans should be implemented in a proactive style. Proactivity requires employers and unions, in predominantly female job classes, to set up or negotiate pay equity plans to correct identifiable wage inequities between male and female dominated job classes. These plans must be posted in conspicuous places to be seen and examined by the workers. They must also convey the future action intended by the employers. This proactive framework no longer depends on a kick-off mechanism in bilateral litigation. Ontario's Pay Equity Act 1987 (amended in 1990) and the English Equal Pay Act 1970 (amended in 1984) endorse a proactive response to challenge discrimination. However s 1(3) of the English Equal Pay Act allows the employer to suspend an equality clause on the proof of a factor other than the difference of sex. This was the reason that *Enderby's* case lost at the local level.⁴⁴

As Hong Kong's Sex Discrimination Ordinance does not address the issue of systemic discrimination, it is hoped that a new separate statute based on the Ontario model, which tackles the issue of systemic discrimination and endorses proactive plans, can be passed. In addition, a special commission can also be set up to deal specifically with the issues of wage differentials between the two sexes and the technical calculation of work value.

⁴² 'Group' refers to the group of victims in cases of discrimination, for example women, racial minorities, or handicapped people.

⁴³ *Action Travail des Femmes v Canadian National Railway Co* (1988) 40 DLR (4th) 193, 210 (SCC) is not on wage discrimination. It is about unequal employment opportunities in the Canadian National Railway Co (CNR). Recognising the chilling effect on females in non-traditional employment, the CNR was ordered to set a goal of reaching 13 per cent female participation rate for blue collar jobs regardless whether there was any justifiable reason behind the old practice.

⁴⁴ See the earlier discussion on the limitation of *Enderby's* case on the point of 'objective justification.'

Pay equity legislation as an interference with the market

As there is no minimum pay legislation in Hong Kong, it seems that wages for local workers are dictated by the simple rule of supply and demand. It is interesting to note that in *Enderby* the court did not treat the collective bargaining process as a justified reason but allowed the terms of contract to be dictated by the market forces of supply and demand. It was held that the principle of equal pay is a 'superior principle of law'⁴⁵ which the parties of a collective agreement cannot choose to disregard. It is ironic for the court to rule out a collective agreement but allow the contractual provisions arising out of individual agreement to prevail over the principle of equality. In substance, the terms and conditions incorporated into a contract of employment by virtue of a collective agreement and contractual provisions which are the product of individual agreement are the same. What is significant is the disadvantaged position in which women workers are bargaining.⁴⁶ It seems that the court is treating market forces as a distinct and independent element from collective bargaining.

The 'true' wage of the worker is determined by the market forces of supply and demand only if the market is operating at its most efficient and optimal rate. In short, the equilibrium wage is dependent on many factors, and one of them is equality of bargaining power.⁴⁷

The market forces of supply and demand may already be tainted if women's worth is not being appreciated. If women lack the power to bargain due to social constraints (for example, the need to take care of the family or children),⁴⁸ the market forces argument already ignores the fact that women workers are contracting at a less advantageous position than their male counterparts at the very outset.

Moreover, the medium of the market may reflect a set of preferences conditioned by prejudice and inequality. J Kentridge asks the interesting question that if passengers on an airline prefer the cabin staff to be tall blonde women, does it justify discrimination against all applicants other than the above category?⁴⁹ Does it justify tall, blonde flight-attendants receiving higher wages than their colleagues? In fact anti-discrimination law should aim to eliminate gender bias that dictates the market. The legislation that bans all

⁴⁵ [1994] 1 All ER 495, 517 para 41a.

⁴⁶ Kentridge (note 39 above), p 204.

⁴⁷ For a fuller discussion on the economic effect of anti-discrimination legislation, see R Posner, 'An Economic Analysis of Sex Discrimination Law' and the reply by J J Donohue, 'Prohibiting Sex Discrimination in the Workplace: An Economic Perspective' in (1989) 56 University of Chicago Law Review 1311 and 1337 respectively.

⁴⁸ Because of the 'family burden,' women often choose to have jobs with flexible working hours or part-time jobs. These types of jobs may not necessarily be less valuable to employers but employers can 'afford' to exclude fringe benefits or pay lower wages.

⁴⁹ Kentridge (note 39 above), pp 198, 205.

airlines from discriminating in the above way is structuring choices in society, but it is entirely consistent with the value of equality that society should uphold. Indeed, the market is constantly being structured in different ways. Certain types of goods or services are banned or restricted; exchanges of goods and services are taxed differentially. Choices are often limited and defined by legislation. Hong Kong does in fact have protective legislation for workers, for women, and for juveniles.⁵⁰ The dictates of the market should not trump the value of equality.

Another common criticism of equal pay legislation is that it is too costly. Opponents argue that any interference with the economy will destroy market flexibility.⁵¹ Therefore, some prefer to see pay equity introduced in ways other than mandatory government intervention. S H Ng suggests a gradualist approach based on moral persuasion as in the Japanese model⁵² while P Weiler proposes voluntary affirmative action through collective bargaining.⁵³ The model based on persuasion is a soft method and can be viewed as a symbolic gesture, while the voluntary method may not work in Hong Kong as trade unions are not very powerful and prominent.⁵⁴

It should be stated that pay equity legislation does not need to lower the wage for men. Therefore, the supply for male-dominated jobs will not be disturbed. The main concern is to increase pay for women in jobs that have been under-valued. In consequence, there may be three possible responses: (1) males may be attracted by jobs previously performed by females; (2) female workers may be substituted for by other means of production, ie capital-for-labour substitution; and (3) there may also be a substitution of the products whose manufacture is intensive in the use of female labour.⁵⁵

However, an Australian study on the effect of equal pay and pay equity legislation from 1966 to 1977 showed that the three responses mentioned above might not necessarily occur. Just as wages for workers are determined by social custom, by institutional factors, and by the creation and destruction of job opportunities, so the effect of equal pay legislation is also affected by such factors.

'Equal pay for equal work' was implemented in Australia from 1969 to 1972, while 'equal pay for work of equal value' was introduced by the government

⁵⁰ For example, Hong Kong had a Female Domestic Service Ordinance in the past (enacted in 1923 and repealed in 1969) and the Factories and Industrial Undertakings Ordinance still exists. For discussion of protective legislation, see S H Ng, 'Employment and Human Rights in Hong Kong: Some Recent Developments' (1994) 24 HKLJ 108, 109.

⁵¹ Ibid, pp 108, 123-4.

⁵² Ibid, p 124.

⁵³ Weiler (note 31 above), pp 1778, 1797.

⁵⁴ In 1990, Hong Kong had fifteen strikes and only 15 per cent of salaried employees and wage earners are union members (see N Miners, *Government and Politics in Hong Kong* (Hong Kong: Oxford University Press, 5th ed 1991), p 32).

⁵⁵ R G Gregory and R C Duncan, 'Segmented Labour Market Theories and the Australian Experience of Equal Pay for Women' (1981) *Journal of Post Keynesian Economics* 403, 413.

(federal tribunal, state government, and wage-fixing tribunal) in three stages from 1972 to 1975. The study was based on government statistics from 1966 to 1977. The three main sectors chosen as illustrations for changes in the female employment rate were (1) the textiles, clothing, and footwear group which was predominantly female and suffered a reduction in its growth rate by 29.9 per cent; (2) the food, beverages, and tobacco group which witnessed a growth rate of 17.6 per cent; and (3) the engineering, metals, and vehicles industry which had a growth rate of 18 per cent in the decade.

In particular, the study pointed out that there are three factors we need to note. First, changes exogenous to the equal pay decision had to be taken into account. One such factor is the differential growth of traditionally male and female jobs that arises from the changing demand and supply patterns for products of different industries. For example, the growth of the service sector is more favourable to female employment. Second, the response of male and female employment may be differentially affected by cyclical patterns in the economy. The increase in women's wages led to a reduction of female employment in the manufacturing sector, but had a negligible effect on the public and community services sectors. This might be partly explained by an increase in import competition in the textiles, clothing, and footwear industry due to a 25 per cent reduction of tariffs on manufacturing imports in 1973. The last point to note is that the same social forces that led to the equal pay decision affect the demand for female labour.⁵⁶ Embedded social conventions and attitudes will always affect the supply and demand for male or female workers. These factors have a stabilising effect on the mechanism of the market. Women may be seen as more suitable to be clerks or nurses, while men may be preferred as blacksmiths and mechanics.

In short, the Australian experience shows that substitution responses to relative wage changes appears to be minimal, and equal pay legislation would be unlikely to cause a sudden increase in the supply of labour in female-dominated jobs. In addition, the cost of paying women higher wages need not be absorbed all at one time. Take the example of Canada: from 1985 to 1990, federal statistics indicate a typical one-time adjustment for an under-valued job to be within the range of C\$2,000 to C\$3,000 per person. The Ontario Public Service pay equity plan yielded an average pay equity adjustment of C\$4,000. In Manitoba, legislation limited the increase in payroll costs to 1 per cent per year, with a cap of 4 per cent. In the United States, the completion of Minnesota's four-year pay equity programme for its 34,000 state employees raised payroll costs by 3.7 per cent.⁵⁷

The Ontario Pay Equity Act simply requires an employer to divide what it would otherwise set aside for compensation in a way that provides adjustments

⁵⁶ Ibid, p 413.

⁵⁷ Todres (note 18 above), p 565.

for the lowest-paid female job classes first. It does not require the employer to allocate additional monies to the wage bill in order to achieve pay equity. In 1990, a study showed that the total cost of pay equity adjustments was 0.7 per cent of the total payroll for the private sector, and 2.6 per cent for the public sector. The total administrative cost of implementing pay equity per employee was C\$88 in the private sector and C\$173 in the public sector.⁵⁸

The Ontario experience tells us that the effectiveness of legislation depends very much on the effectiveness of the method we adopt. In Ontario, there is a phase-in period of six years for pay equity to be introduced. This has been extended by three more years due to the slowdown of economic recovery from the recent recession. It applies first to the public sector, then to the larger private sector firms, then smaller firms, finally workplaces with ten to 49 employees. Small private sector firms with fewer than ten employees are exempted.⁵⁹ Moreover, the Ontario Act allows opting out of the Act under nine circumstances.⁶⁰

Besides proving that a pay equity plan would not disturb the market and might not be costly, the Canadian Association of Women Executives and Entrepreneurs also pointed out that:

there is ample evidence to support the view that employees who believe that they are fairly treated by their employers are more productive and more responsive workers. In addition, higher wages for women mean greater purchasing power, and women will be more self-sufficient when they retire because increased incomes will mean higher pensions.⁶¹

A proposed move towards equity

Hong Kong needs a fiscal measure that is responsive to women's needs but one that also allows local businesses to maintain their competitive edge. It is not disputed that legislative measures should involve a careful equilibrium of conflicting interests. However, to argue that pay equity legislation is too costly implies that women somehow have a duty to be paid less until other financial priorities are satisfied. Under the present unequal structure of representation, the market reflects values consistent with traditional male roles and rewards 'masculine' choices, while ignoring 'feminine' concerns and penalising 'choices'

⁵⁸ 'Factsheet on a Report Presented to the Pay Equity Commission, An Evaluation of Pay Equity in Ontario: The First Year, June 1990' by SPR Associates Incorporated, material kindly supplied by the Ontario Pay Equity Commission on author's request.

⁵⁹ Pay Equity Act, ss 11 and 18.

⁶⁰ The nine circumstances under s 8 of the Pay Equity Act are different performance ratings; seniority; red circling (wage curtailment following downgrading); a rehabilitation assignment; a demotion pay procedure; a procedure of phased-in wage reductions; a temporary training position; a labour shortage requiring premium wages; and a change in the work performed.

⁶¹ E Todres, 'With Deliberate Care; The Framing of Bill 154' (1987) 16 Man LJ 221, 226.

consistent with traditional female roles. In fact, the existence of free choice may be doubted as women are often 'pushed' into certain job categories by discrimination.⁶²

The establishment of the Equal Opportunities Commission

Under s 62(1) of the Sex Discrimination Ordinance, an Equal Opportunities Commission will be established to assist in the enforcement of the SDO and to work towards the elimination of sex discrimination. In addition, under s 63(1)(e), the Commission should keep under review the working of the ordinance. If unequal pay for equal value of work is recognised as a problem not within the coverage of the ordinance, it may be necessary for the Commission to take up pay equity as a possible amendment to the Sex Discrimination Ordinance. It would be ideal if the Hong Kong Equal Opportunities Commission could have adjudicatory or mediatory powers as in the Canadian model. The Canadian Human Rights Commission is a body established to handle complaints, as well as to perform educative and research functions. One of the first collective complaints to the Canadian Human Rights Commission was filed by the Public Service Alliance of Canada (PSAC) on behalf of the predominantly female librarians working in the National Library in Ottawa in 1979.⁶³ The complainant pointed out that there was a 20 per cent difference between government employees in the Library Sciences Classification, which was more than 56 per cent female, and employees in the Historical Research Classification, which was more than 75 per cent male. After establishing the existence of wage discrimination (regardless of the reasons behind it), and that the two jobs were of equal value, the PSAC was granted C\$2.3 million in back pay. Another victory was secured by the PSAC on behalf of women working in the General Services Occupation Group. The tasks performed by women in kitchen, laundry, and miscellaneous personal services attracted considerably lower wages than those performed primarily by men in the same occupation group of messenger, custodial, building, and store service.⁶⁴

Government as a leader in pay equity

In view of Hong Kong's lack of experience with any anti-sex discrimination legislation and the prevailing conservative response from the government,⁶⁵ a

⁶² For employment discrimination against women, see Hong Kong Women's Coalition for Beijing '95, 'Alternative Report on Women in Hong Kong,' submitted to the first East Asian Women's Forum — a regional preparatory meeting for the upcoming NGO Forum, the '95 United Nations World Conference on Women.

⁶³ R Warskett, 'Political Power, Technical Disputes, and Unequal Pay: A Federal Case' in Fudge (note 26 above), p 137.

⁶⁴ Canadian Human Rights Commission, 'General Services,' news release of 19 March 1981; news release of 2 March 1982, in *Equal Pay Casebook, 1978–1983* (Ottawa: Canadian Human Rights Commission, 1983), pp 7–8.

⁶⁵ 'Scope of Wu's Bill Too Wide — Officials,' South China Morning Post, 6 August 1994; 'Patten Out of Touch, Say Women,' South China Morning Post, 10 December 1994.

modest version of a proactive pay equity plan is required. For example, Hong Kong could adopt a gradualist model with a phase-in period, with pay equity to be progressively implemented over a ten-year period. The government should be the leader in carrying out a pay equity plan,⁶⁶ which should then be applied to large companies having more than one hundred people, and then further extended to smaller establishments in the future. The first step should be for the Hong Kong government to study whether pay equity is presently being practised in government departments.

Conclusion

Pay equity may be described as a demystifying process⁶⁷ through which the values of job content will be questioned and challenged. Pay equity supporters do not want to keep swirling around different notions of 'equality,' wrestling to define and to distinguish whether women are 'equal' to men, or whether they are different but should have a right to 'equal' treatment. The pay equity movement does not even directly challenge the argument that discrimination is caused by a defective market structure. In fact, its supporters accept that the market is highly segregated, but assert that the assimilation of women into male-dominated jobs is not the only way to end discrimination. They argue that women's work has its own worth but that this has been ignored and undervalued, and that women do not want to be judged by male norms to prove their worthiness.⁶⁸

Though the current widespread discriminatory practices in the market cannot be tackled by legislative measures alone, legislation is a positive and important step towards enhancing women's status in society. Society still needs skills training, education, access to child care, and other social and economic measures. Moreover, pay equity needs to merge with employment equity⁶⁹ so as to provide a comprehensive solution. Only in this sense can a legal system be seen as an 'instrument of empowerment,' making significant strides towards equal employment opportunities and allowing access to the avenues of power.

⁶⁶ According to Table 2.9, 'The Average Daily Wages of Workers Engaged in Government Building and Construction Projects,' in *Hong Kong Monthly Digest of Statistics*, February 1995 (Hong Kong: Government Printer, 1995), the daily wage for male labourers in November 1994 was \$424.7 while for female labourers it was \$351. The definition of labourer in both sexes was the same, which included excavator, concreter, bricklayer, and plasterer. Maybe it is time for the government to study whether it gives the same wage for the same job and the same wage for equal value of jobs between the two sexes.

⁶⁷ Referred to in the discussion 'From Equal Work to Equal Value of Work' of this paper.

⁶⁸ The assimilation theory is evaluating women according to male norms, without questioning the basic assumption that the criteria used are loaded and defective.

⁶⁹ Employment equity includes direct, indirect, and systemic discrimination. See R S Abella, 'Employment Equity (1987) 16 Man LJ 185.